Supreme Court, U.S.
FILED

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No.

IN THE

Supreme Court of the United States

KIT CARSON,

Petitioner,

v.

NEWS-JOURNAL CORPORATION,
AND TIPPEN DAVIDSON,

Respondents.

On Petition For Writ of Certiorari
To The Supreme Court of Florida

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This is not just an appeal involving an action for defamation. It is an appeal involving the abuse of the First Amendment by a newspaper claiming the protection of "privilege" and "pure opinion" while engaging in the fraudulent manipulation of judicial, state, and federal elections. Much like Colombian drug lords, who assassinate anti-drug judges, politicians, and journalists, respondents engaged in character assassination of an anti-drug judicial candidate in this case.

1. Whether, in a defamation action brought by a candidate for public office, state "qualified privileges" must fail where the media acts with "actual malice."

Subsidiary Questions:

(a) Whether the protection of *New York Times v. Sullivan* can be waived.

(b) Whether *New York Times v. Sullivan* should be revisited and overruled.

2. Whether judicial candidate's announcement of his "Zero Drug Tolerance" criminal sentencing policy is protected by the First Amendment.

3. Whether statements in a newspaper article which fail to disclose their factual basis are assertions of fact – and not pure opinion protected by the First Amendment – subjecting the publishers thereof to liability for defamation

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OPINIONS BELOW

The opinion of the Florida Fifth District Court of Appeal (Appendix, 2a-4a) is reported at 790 So.2d 1120 (Fla. 5th DCA 2001). Petitioner timely sought mandatory and discretionary review in the Florida Supreme Court. On January 9, 2002, the Florida Supreme Court dismissed Petitioner's petition for discretionary review, granting respondents' Motion to Dismiss, on the ground that Petitioner's jurisdictional brief for discretionary review exceeded ten (10) pages. The judgment of the Florida Supreme Court (Appendix, 1a) is not reported. This constitutes the final order of the Florida Supreme Court with respect to this case.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a) and *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990).

STATEMENT OF THE CASE

Prior to commencing this appeal, your Petitioner lived and practiced criminal defense law in Daytona Beach, Volusia County, Florida. While there, he established a good reputation and was elected to serve as Vice President of the local criminal defense lawyer's association. He was also appointed to the City Commission's Narcotics Task Force. In 1996, Petitioner sought election to the office of Public Defender and was narrowly defeated. In 1998, he attempted to realize his dream of becoming a judge by campaigning for Volusia County Judge, losing by a mere 430 out of over 31,000 votes. It was these endeavors from which Petitioner's nightmare, and assassination of his character by the respondents, began.

Petitioner received his BA and JD degrees from the University of Florida where he majored in the study of the criminal justice system. Prior to completing law school, he was employed as a state correctional officer and as a city police officer. While employed as a police officer, his evaluations were consistently "above average" to "outstanding" and he received numerous citizen commendations.

After graduating from law school, Petitioner became an Assistant State Attorney in Tavares, Lake County, Florida. As a prosecutor, he had a policy to stop the unnecessary plea bargaining away of strong charges filed by local law enforcement officers. In this effort, he encountered a judge who thought that he should plea bargain away strong charges. When Petitioner would not do so, the judge illegally dismissed charges. *See, e.g., State v. Brown*, 416 So.2d 1258 (Fla. 4th DCA 1982). A new State Attorney, who had promised change, was elected to office in 1984. After a second, new, judge illegally dismissed a grand theft charge to which a defendant had already pleaded guilty, Petitioner sought the assistance of the new administration. When it appeared that the new administration would not bring about any changes, Petitioner submitted his resignation. Petitioner was highly respected by crime victims he represented. On January 24, 1985, Petitioner's resignation made the front page of the local newspaper. A forged, altered, and miniaturized, copy of this news article was apparently provided to the respondent's by one of their, as yet unnamed, sources.

Much to the surprise of certain officials in Lake County, Petitioner became employed as an Assistant Public Defender in his home town, Lake City, Columbia County, Florida, on February 5, 1985, less than two weeks after his resignation as a prosecutor. The Public Defender, Milo Thomas, was aware of the controversy surrounding Petitioner's resignation at the time.

Petitioner's performance as an Assistant Public Defender was found to be satisfactory by his supervisor, Jimmy Hunt, who reviewed it with Milo Thomas. Petitioner frequently accompanied Hunt on court related matters in the counties of the Third Judicial Circuit of Florida. He competently performed all tasks assigned to him and got along well with others.

Unbeknownst to Petitioner, a few vindictive officials from Lake County began working to undermine and interfere with his employment in Lake City. A judge from Lake County called a judge in the Third Judicial (Lake City) Circuit about Petitioner. A copy of a Lake County newspaper article and Petitioner's resignation letter had been mailed to Lake City and were shown to Milo Thomas. A prosecutor, who learned of Petitioner's resignation letter, had threatened to stop plea bargaining with the office because of Petitioner's plea bargaining policy in Lake County. After one month,

and discussions with Jimmy Hunt, Milo Thomas had decided to continue to employ Petitioner. Two weeks later, on March 15, 1985, a very nervous Milo Thomas reconsidered that decision and fired Petitioner from his job as an assistant public defender. On that day, Thomas wrote as the reason that he fired Petitioner, "Not compatible with this office." This was placed in Petitioner's personnel file. Petitioner was fired from his job because of improper tortious interference with his business relationship by a vindictive Lake County judge and because of his beliefs about plea bargaining. He suffered retaliation from Lake County as a whistleblower. There was nothing wrong with Petitioner's work performance while at the Lake City Public Defender's Office.

Six weeks later, having been too proud to go on the public dole, Petitioner finally applied for unemployment compensation. Milo Thomas opposed Petitioner's application for compensation and wrote, falsely, that he had terminated Petitioner because, in his "opinion," Petitioner's work was "very unsatisfactory." This conflicted with his prior statement, in papers signed on the day he fired Petitioner, where his only comment was, "Not compatible with this office."

Milo Thomas was known to be an employer who did not believe that anyone he fired should receive unemployment compensation and that he would do anything he could to try to prevent them from receiving such compensation, including lying. This was consistent with his "ends justify the means" character when, many years before, Thomas had stuck a gun under the nose of a black man who had dared to sit in Thomas' "chair" in a Lake City restaurant.

The Lake City unemployment claims officer conducted an investigation into the true reason for Petitioner's termination by Milo Thomas. Matters of credibility were resolved in favor of Petitioner. The claims officer noted that Petitioner was fired "without prior notice, or warning." He was found to have been terminated for reasons other than misconduct at work, (tantamount to) an acquittal of Milo Thomas' false allegation, and unemployment compensation was awarded.

In July, 1985, Petitioner was hired as an Assistant Attorney General in Daytona Beach, Florida. At the time, the office was a small office with the number of attorneys varying from seven to nine. His supervisor, Bureau Chief Richard Prospect, prepared Petitioner's employment performance evaluations for the periods from October

1, 1985 to April 1, 1986 and from April 1, 1986, to October 1, 1986. Consistent with Petitioner's good employee character, the evaluations noted that Petitioner achieved and exceeded standards in various respects. He exceeded performance standards in areas such as caseload management, quality of written work product, professional attitude and cooperative spirit with co-workers and personnel outside the department, and initiative and motivation. (He was honored when a panel of the Florida Fifth District Court of Appeal ("5thDCA") quoted from his brief in a narcotics case. *State v. Radcliffe*, 483 So.2d 95 (Fla. 5th DCA 1986), n. 1). Petitioner was promoted to Senior Assistant Attorney General.

Eleven months into the third evaluation period, Mr. Prospect resigned from the Attorney General's Office and entered into private law practice. As bad luck would have it, a rival within the office came into power. This rival was allowed to have input into Petitioner's third evaluation, even though the Tallahassee assistant attorney general who signed off on the third evaluation had been warned by Petitioner not to let the rival have input into the evaluation. The Tallahassee assistant had never worked in the Daytona office and could not possibly evaluate Petitioner's performance. This last evaluation, dated October 1, 1987, was a terrible, false, and bogus evaluation of Petitioner's job performance for the previous year. [In April, 2000, Petitioner's former supervisor, Richard Prospect, verified that Petitioner's third evaluation would have been at least consistent with his two previous evaluations].

Four months later, on February 4, 1988, Petitioner was fired from the attorney general's office by attorney general officials from Tallahassee. No reason was given a the time. [Assistant Attorney General's are "at will" employees. Given the choice between resigning or being fired, a much younger Petitioner chose to be fired because he had done nothing wrong and to preserve his unemployment compensation rights]. Petitioner immediately applied for unemployment compensation and the hearing officer began an investigation into the true reason for his termination. The Attorney General's Office attempted to oppose Petitioner's application for compensation by falsely alleging egregious misconduct--that Petitioner had been terminated for refusing to perform the assigned work. The allegation was false and inconsistent with Petitioner's employment history, so, they could never submit information

substantiating the allegation. Matters of credibility were resolved in Petitioner's favor. He was found to have been terminated for reasons other than misconduct at work, an acquittal of the false allegations. Unemployment compensation was awarded. Petitioner's supervisor at the time of his firing knew Petitioner to be the kind of employee who actually volunteered to do work in the office, when time permitted. One does not get unemployment compensation for refusing to perform the employer's work.

One month later, March of 1988, Petitioner was hired as an Assistant Public Defender in Daytona Beach, Florida, by James Gibson, the Public Defender for the Seventh Judicial Circuit, the very same office that Petitioner had handled cases against while working for the Attorney General's office. Gibson was aware that Petitioner had been fired from the Attorney General's office. Consistent with his good character, Petitioner received an above satisfactory employee performance evaluation, the highest rating possible. Petitioner was highly rated in areas such as dependability, quality of work, initiative, job knowledge, and relationship with people. On December 14, 1989, Chief Assistant Public Defender Ron Zimmet wrote a letter to one of Petitioner's clients, saying, "Mr. Carson is one of the best attorneys in the state. You should be grateful that he has been assigned to your case." In April, 1990, Petitioner resigned from the Public Defender's Office and entered the private practice of law. He was employed by the Public Defender's Office for two years.

In 1996, Petitioner sought election to the office of Public Defender for the Seventh Judicial Circuit of Florida. Petitioner was interviewed by the respondents, who had a longstanding policy of making election recommendations to their readers. Respondents explain why they recommend as follows:

> "The News-Journal editorial board makes election recommendations in an effort to provide information that isn't readily available to many voters. The board invites candidates for an interview to learn about their character, background and opinions. Board members review files of news clippings on the candidates' records. The board also talks to people who know the candidates. Many voters have neither the time nor opportunity to make a thorough investigation of every candidate. Recommendation editorials are intended to give readers the benefit of the editorial board's research."

During the 1996 interview, Petitioner explained to respondents' editorial board his plan to implement a Public Defender fee recoupment program that would benefit the justice system in their Circuit by at least $500,000 per year. Petitioner showed the editors that Lake City Public Defender Dennis Roberts' program had won awards in 1991 and 1992 from Florida Tax Watch group; that Dade County Judge Scott Silverman wrote an article about public defender fees for the May 1996 Florida Bar Journal; and, that The Bar Journal had favorably noted Roberts' circuit as the Number 1 collector of public defender fees. The editors were provided with a newspaper article about Roberts' successful program. They were also provided a copy of *Bull v. State*, 548 So.2d 1102 (Fla. 1989), holding that there is no conflict of interest involved in the recoupment of legal fees by Florida public defenders from their clients. Petitioner explained this to them.

Respondents ignored Petitioner and destroyed his papers. Respondents published a defamatory and false editorial in which they endorsed Petitioner's opponent. Ignoring their promise to readers and candidates, they did no investigation and they never asked Petitioner about false statements they printed about his employment at the Lake City Public Defender's office or the Daytona Beach Attorney General's office or why he left those offices. They sought to minimize his experience at the Daytona Beach Public Defender's office by falsely stating that Petitioner was employed there "for about a year." He worked there for two years. They never mentioned his above satisfactory employee evaluation while there. They stated, falsely, that he had no experience managing employees. They stated, falsely, that his employment in the justice system ended in 1990. They simply ambushed and humiliated him in their editorial.

Through their editorial, they accused Petitioner of being an incompetent and unethical lawyer They said his proposed Public Defender fee recoupment program was unethical because of conflict of interest (App. 13a). They made their claim of conflict of interest knowing that, in *Bull v. State*, the Florida Supreme Court had said there was no conflict of interest. They misrepresented the law and the facts to their readers. To respondents, the end justified the means. Petitioner was narrowly defeated at polls in the 1996 election for Public Defender.

In 1998, Petitioner sought election to the office of County Judge for

Volusia County, Florida. Petitioner was interviewed by the respondents, who were continuing their policy of making election recommendations to their readers.

During the interview Petitioner told the respondents that the 1996 editorial was not true and represented a reckless disregard for the truth. He attempted to explain his work history and his "Zero Drug Tolerance" campaign idea. He plainly stated that the reasons given by the Lake City Public Defender's office and the Daytona Attorney General's office for his termination from employment were false. He invited respondent's to contact his former supervisors at those offices, who were awaiting respondents' phone calls.

[During trial court proceedings, Petitioner repeatedly stated that summary judgment and dismissal without full discovery would be premature. Additional evidence would have revealed that, during the interview, he noted the national and international aspect of America's drug problem. He told of four Florida teenagers who were murdered by drug smugglers, their bodies found months later in a creek by divers. He told of a two year old killed in a crossfire between drug dealers. He told of a DEA agent in Mexico who was kidnaped, tortured, and murdered, after the agent tried to stop marijuana smuggling. (They destroyed his letter to them containing these facts). He gave them (and they later destroyed) a news article reporting that hundreds of anti-drug crusading politicians, **judges**, and journalists had been killed in Colombia. (He said, plainly, that those who buy illegal drugs finance these killings). He told them about incumbent Circuit Judge Kim Hammond's "Do the sale, go to jail" drug dealer sentencing policy for first time offenders. And when jail didn't seem to work, Hammond sent drug dealers to prison. (They destroyed his letter which mentioned Hammond's policy). He gave them a copy of their own news article about Hammond. (They destroyed it). He told them his sentencing policy was inspired by his mentor, Circuit Judge (and Former Public Defender) Robert Miller. He gave them a copy of *Keenan v. Watson*, 525 So.2d 476 (Fla. 5th DCA 1988), holding that a Daytona Beach judge who sentenced all drug users to jail would not be disqualified in drug cases because bias against the crime is not bias against the person, and, that the issue of leniency or severity in sentencing was a political matter for the voters. He gave them a copy of *ACLU v. The Florida Bar*, 744 F.Supp. 1094 (N.D. Fla. 1990), granting a permanent injunction against enforcement of

a candidate speech restriction in Florida's Code of Judicial Conduct, and, holding that how judges choose to exercise their discretion is a matter of much concern to litigants, lawyers, and voters. The federal court had expressly rejected Florida's argument that letting voters hear how judges will handle certain issues would undermine the public's confidence in the objectivity of the judiciary. (They destroyed these copies). He explained the need for the State judiciary to join the federal judiciary in the "War On Drugs" and that the federal government could not win that war alone.]

Ultimately, respondent's executive editor, Don Lindley, interrupted the judicial candidate and began **yelling** at him and repeatedly telling him to "**shut up.**" Their political editor, Pamela Hasterok (now Lindley's wife), had previously bragged that the respondents manipulate elections in favor of the Democratic Party, unless that candidate is "abysmal." Respondent's were given several copies of a letter in which Petitioner described his campaign, mentioning the sentencing policy of other judges, the rationale behind his sentencing policy, and other matters relating to character. The letter also contained the home and work phone numbers of Petitioner's former supervisor's from the Lake City Public Defender's office and the Daytona Beach Attorney General's office. (Respondents destroyed these copies). Respondents never contacted these people.

Again, respondents ignored Petitioner. They published defamatory and false stories about him and an editorial in which they endorsed his opponent and called him unethical. Pamela Hasterok wrote the editorial. They misled their readers about the Petitioner's background, republishing false and defamatory comments and false facts as if they were true. (App. 12a-13a). They reported that he had only two (instead of three) evaluations from the Attorney General's office. They ignored Petitioner's warning that the third evaluation was a false evaluation. They destroyed the copies of all three evaluations that Petitioner had given them. They failed to report that, in a letter, Petitioner had been called "one of the best attorneys in the state" while working at the Daytona Beach Public Defender's Office. They intentionally misrepresented the law and the facts in their articles. They threw away and destroyed papers that were given to them by the Petitioner. Their reporter ignored his warnings and documents during her August 19, 1998, interview with him and, later, falsely swore that she relied on what they had on August 18, 1998,

the day before the interview.

[Additional evidence would show that at the same time, they did not report 1997 and 1998 Volusia County Bar Association polls rating Petitioner's opponent, nine year incumbent Judge Worthen, as lowest rated of all of the judges in the Circuit in legal knowledge and ability. (They destroyed copies of the polls that Petitioner had given to them). And, while they were calling Petitioner unethical, they did not report Judge Worthen's criminal sentencing record or promise – probation for first time drug offenders. In fact, Worthen had said that it might be "four or five times" before he might put someone in jail for drug possession. They were aware of Judge Worthen's record and promise. Depositions of their editors and reporter would have provided additional information regarding express and actual malice.]

Petitioner was defeated at polls in the 1998 election for county judge by only 430 out of over 31,000 votes. The respondents' false and defamatory articles caused the loss of the election.

Petitioner sued respondents for libel arising out of their 1996 and 1998 news articles. Respondents never filed an Answer to the Petitioner's Complaint. Instead, on February 26, 1999, twenty days after being served with Petitioner's Complaint, respondents filed their Motions To Strike, Motions To Dismiss, And Motions For Partial Summary Judgment And Memoranda Of Law In Support Thereof. Their motions were directed to 14 statements that Petitioner had identified in his complaint as false and defamatory. App. 10a-12a.

Respondent's invoked their "journalist's privilege" (App. 6a) in order to obstruct Petitioner's ability to conduct complete discovery of facts which were detrimental to them and to hide the fact that they had destroyed evidence. They have yet to reveal their sources.

Petitioner responded to respondent's motions, arguing that the motion for summary judgment was premature and should be denied, that (based upon their editorial promise of thorough investigation) they had waived the fair reports privilege; that the fair reports privilege did not apply; that the fair reports privilege had been abused; that respondent's "opinions" which were based upon manipulated, false, and undisclosed facts were not privileged; that they had acted with actual and express malice; and, that their comments about Petitioner were susceptible of defamatory meaning.

During the second hearing in the case, on April 15, 1999,

respondents' attorney, John Kaney, Jr., issued a veiled threat to the trial judge, saying, "If Judge Will were to be unendorsed ... " John Kaney, Jr., is married to the publisher of respondents' newspaper and is a member of their Board of Directors. Prior to being appointed by the Governor, Judge Will had been defeated in a judicial election by a near 2 to 1 margin when respondents' endorsed his opponent.

Petitioner's claim that respondents claim of privilege was defeated by actual malice was raised in his October 20, 1999, "Response To Defendants' Post Hearing Memorandum Of Law Re: Motions For Summary Judgment," at pages 22-28, where he wrote, "The better view is that the privilege is lost if demonstrated that publication was made with knowledge of falsity or with reckless disregard of truth." This argument continued into the appellate court. Both courts found that the contested statements were protected by privilege. Implicitly, that there was no malice.

Petitioner's claim that his discussion of his "Zero Drug Tolerance" policy was protected by the First Amendment of the United States Constitution was raised during the campaign, (App. 14a), and was discussed during a hearing on respondents motions on July 22, 1999. At page 20 of the transcript, respondents' attorney says, "And the editorial writer concludes – continues to say, 'Carson simply blows off any ethical concerns by asserting free-speech rights.' And my – argument there is simply that the meaning of that sentence is that he has a right under the First Amendment to campaign – and when you read the editorial they're talking about, is the way in which he's campaigning." At page 25, respondents' attorney continues, "An ethical rule that unconstitutionally abridges a judicial candidate or any – lawyer's speech or anyone else, is not in fact a rule. It is unlawful. That's *Marbury v. Madison*. That's what – how we operate in constitutional terms." The trial court dealt with the issue, in its June 14, 2000, by finding that the editorial writer's conclusion, and the entire editorial was protected as pure opinion. In the appellate court, the argument was subsumed into the opinion argument. During oral argument, petitioner discussed the implications of *ACLU v. The Florida Bar*, *infra*. Petitioner also argued that his drug sentencing policy was exempt from the "pledges and promises" prohibition of the Judicial Canon because his sentencing policy was part of the faithful and impartial performance of a judge's duties. The court affirmed the finding of "pure opinion"

without discussion.

The pure opinion issue was raised by respondents in defense of Petitioner's defamation complaint against them. The trial and appellate court agreed that all of the statements contested by respondents (App. 13a-14a) were protected as pure opinion.

On November 4, 1999, two months after the hearing on summary judgment, respondents admitted destroying evidence Petitioner had given them. Respondents had filed an appeal, *see*, *News-Journal Corporation v. Carson*, 741 So.2d 572 (Fla. 5th DCA 1999), in order to conceal this destruction, to obstruct discovery. Their attorney was sanctioned by the 1999 panel of the 5thDCA, almost a year later, after the trial judge (Judge Will) refused to sanction them. Since their attorney is married to their Publisher, the $2000 sanction and the fact that the 5thDCA panel called what he did "frivolous or bogus" was never reported.

Petitioner argued that respondents waived the protection of the *New York Times* standard in response to respondents' petition for writ of certiorari in *News-Journal v. Carson*, 741 So.2d 572 (Fla. 5th DCA 1999). The court rejected that argument.

After Judge Will rescinded an order requiring respondents to give a detailed explanation regarding the destruction of the papers in their possession and refused to get to the bottom of the destruction, Petitioner tried, unsuccessfully for the second time with a different 5thDCA panel, to have Judge Will disqualified. *Carson v. News-Journal Corporation*, 768 So.2d 12 (Fla. 5th DCA 2000).

On June 14, 2000, respondents various motions were granted and consolidated in one "Final Summary Judgment" order. On July 12, 2000, Petitioner filed his notice of appeal.

On June 15, 2001, the Florida Fifth District Court of Appeal (hereafter "5thDCA") affirmed the trial court's order. (App. 2a-4a).

REASONS FOR GRANTING THE PETITION

I. The Florida court decisions conflict with decisions of this Court and of the Circuit Courts of Appeal.

The Qualified Privilege question. At the time respondents' moved for summary judgment as to these allegations in the complaint they had not even filed an answer to the complaint and no discovery had

taken place. As a result, they admitted the truth of the allegations in the complaint and all doubts regarding the existence of a genuine issue of material fact should have been resolved against them and favorable inferences reasonably justified by the evidence should have been liberally construed in favor of Petitioner. In order to assert the "fair reports privilege," respondents admitted that the applicable statements were false and defamatory. App. 12a-13a. They submitted no evidence as to the 1996 libels. They destroyed evidence as to the 1996 and 1998 libels. Petitioner alleged both express malice and actual malice. This Court has applied the principles of *New York Times v. Sullivan*, 376 U.S. 254 (1964), in public figure libel cases.

The Florida decisions conflict with *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967), and *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657 (1989). In *Curtis*, the Saturday Evening Post published an article accusing a college coach of "fixing" a football game. The source claimed to have overheard a conversation between Butts and the opposing team coach and to have taken notes during the conversation. Before publication, the Post had been notified by Butts and his daughter that the material about to be printed was false. *Id.* at 162, n. 23. The story was not "hot news" and this Court noted that the magazine did not take even the most "elementary precautions" *before* printing the story. There was no attempt to examine the source's notes or, more significantly, to view the tapes of the football game to see if the opposing team had used the plays that Butts had allegedly passed to its coach. A witness who was supposed to have been present when the conversation was overheard was not interviewed. *Id.* at 157-158. This Court noted that "words defamatory of another are still placed in the same class with the use of explosives or the keeping of dangerous animals. *Id.* at 152. It was held that qualified or conditional privileges may be vitiated by actual malice. . The jury verdict for Butts was upheld and the actual malice standard for liability was found to have been met on these facts. *Id.* at 162, n. 23.

In *Harte-Hanks*, the newspaper, relying on a single source, accused a candidate for public office of using "dirty tricks" so as to cast doubt on his opponent. The newspaper failed to interview a key witness who would have contradicted the defamatory allegations of their source. *Id.* at 682. The newspaper also failed to review two audiotapes that could easily have verified or disproved the

allegations. *Id.* at 683. This Court's decision turned on the "purposeful avoidance of the truth" and the paper's deliberate decision to avoid information that might have proven the story false. This Court held that the evidence supported the jury's finding of actual malice; it was "likely that the newspaper's inaction was a product of a deliberate decision not to acquire knowledge of facts that might confirm the probable falsity of [the] charges." *Id.* at 692.

Petitioner's case against the respondents is even stronger than what was allowed to go to the jury in *Curtis* and *Harte-Hanks*, yet the Florida court affirmed the summary judgment and dismissal. The "purposeful avoidance of the truth" is evident when respondents' promise a "thorough" investigation into background and character and to bring all of their information to their readers – and then they claim they don't have to investigate at all. The respondents' case gets worse when they fail to ask petitioner about the false allegations in 1996 and ambush him with them. Then, in 1998, they ignore Petitioner's warning that the material about to be printed was false (as the Post did in *Curtis*) and republish the defamatory material, causing Petitioner to lose the election. They have the telephone numbers of those people who would contradict their story; yet, respondents don't even expend the minimal effort to pick up the phone or drive the short distance to interview the witnesses. They advertise that their stories are "believable" and "accurate." Instead, they distort his background, destroy papers he gave them, republish defamatory statements, make up false facts of their own, and engage in the raunchiest form of character assassination. "Freedom of the press under the First Amendment does not include absolute license to destroy lives and careers." *Curtis*, *supra*, at 170 (Warren, C.J., concurring).

"Truth avoidance" may also be equivalent to "express malice" required by some states to defeat a qualified privilege. *See*, *Reilly v. Gillen*, 423 A.2d 311 (N.J. App. 1980)(privilege lost; republication performed to cripple candidate's reelection chances).

Intentional destruction of documents is "compelling" evidence of actual malice. *Brown & Williamson Tobacco Corp. v. Jacobson*, 827 F.2d 1119, 1135 (CA7 1987).

Evidence of selective reporting of particular facts in order to slant the story against a party, to present an essentially untruthful and highly damaging picture, or disregarding other evidence that tends to

describe the scene in a light more favorable to a party is evidence of actual malice. *Tavoulareas v. Piro*, 758 F.2d 90, 124-125, n. 41 (CADC 1985).

Where a publisher undertakes to investigate the accuracy of a story and learns facts casting doubt on the information contained therein, it may not ignore those doubts, even though it had no duty to conduct the investigation in the first place. Readers of reputable publications are far more likely to trust the verbatim accuracy of the stories they read. The harm inflicted by a misstatement in a publication known for scrupulously investigating the accuracy of its stories can be far more serious than a similar misstatement in a publication not known to do so. *Masson v. New Yorker Magazine, Inc.*, 960 F.2d 896, 901 (CA9 1992), n. 5. Thus, where a publisher undertakes a duty to investigate, the failure to investigate is evidence of "truth avoidance" or actual malice.

In her concurring opinion, Judge Sharp made it clear that "it is almost never appropriate" to grant a motion for judgment on the pleadings based on the complaint alone or the complaint and an answer, where the cause of action is one for defamation, and the defendant's asserted defense is privilege." *Stucchio v. Huffstetler*, 720 So.2d 288 (Fla. 5thDCA 1998). The inferences available to the jury are in this case are somewhat similar to those mentioned in *Harte-Hanks*, *supra*, at 689, n. 36, including the inference that their editorial endorsement process was a sham. Based upon conflict with decisions of this Court, granting certiorari review is warranted.

The Opinion question. The Florida decisions conflict with *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990). In *Milkovich*, this Court held that there is no wholesale defamation exception for anything that might be labeled opinion. This Court noted that the statement, "In my opinion John Jones is a liar," (1) implies "a knowledge of facts which lead to the conclusion that Jones told an untruth." *Id.* at 18. (2) Even if a speaker states the facts upon which he bases his opinion, if those facts are either (a) incorrect, or, (b) incomplete, or, (c) his assessment of them is erroneous, the statement may imply a false assertion of fact." Worthy of note was that "even the privilege of fair comment did not extend to 'a false statement of fact, whether it was expressly stated or implied or implied from an expression of opinion' Restatement (Second) of Torts, § 566, Comment *a* (1977)." *Id.* 18-19. *Cianci v. New Times Publishing Co.*,

630 F.2d 54 (CA2 1980), held that an allegation "which could be reasonably understood as imputing specific criminal or other wrongful acts" is not privileged as "opinion" since such allegations are not "undefined slogans that are part of the conventional give and take in our economic and political controversies." Judge Friendly averred that calling charges of criminal conduct "merely an expression of 'opinion' would be to indulge in Humpty Dumpty's use of language. We see not the slightest indication that the Supreme Court or this court ever intended anything af the sort and much to demonstrate the contrary." *Id.* at 64.

Instead of applying the factors provided by this Court, the Florida courts ignored the objective factors showing that the statements were unequivocally factual assertions. And, accusing a lawyer of being unethical or incompetent (a professional "crime") is not, as Judge Friendly describes, "part of the give and take in our political controversies," because such assertions are defamatory per se.

Respondents manufactured a claim of an ethical violation when they wrote, "Florida's judicial ethics also bar candidates from asking for donations. Yet Carson's own campaign brochure, paid for by Carson as treasurer, asks people to 'Contribute funds to the Kit Carson for Judge Campaign.' Carson's 'zero tolerance' looks more like 'zero ethics.'" (App. 14a).

They misled voters with incomplete information and didn't tell them that there is no ethical rule prohibiting judicial candidates from acting as their own treasurer. They didn't tell voters that it is quite common for judges to do this in Volusia County, or they have their wives do it, so as not to burden others. Judge Worthen's wife was his campaign treasurer. The candidate has to read and sign the treasurer's report. They misled readers by not telling them that Florida law *requires* that the person paying for the ad is required to put his name on it. Section 106.143(1)(a) & (b), Fla. Stat. (1999). (App. 7a). They also didn't tell the voters that any ad "offered by or on behalf of the candidate must be approved in advance by the candidate" and that such ad "must expressly state that the content of the advertisement was approved by the candidate and must state who paid for the advertisement." Section 106.143(4)(a), Fla. Stat. (1999). (App. 7a). Identifying the campaign treasurer is required by law.

They wilfully misstated the law and didn't tell readers that Code of Judicial Conduct, Canon 7(C)(1), only prohibits a judicial candidate

from "*personally*" soliciting campaign funds. (App. 11a). They conveniently left that word out because the brochure is not personal solicitation. Personally means "in person." The respondents were told by Petitioner that their statement was untrue *before* they even printed it; however, their minds were made up. They chose to libel Petitioner, anyway. Even they recognize the false nature of their statement when they stretch it in their "Motion to Dismiss" (on "pure opinion" grounds, at page 29) and falsely claim Petitioner was publishing literature *over his signature* asking for contributions. There was no signature. There is simply no legal or factual basis for their libelous accusation.

Their statement, "Carson fails to see the conflicts of interest inherent in his proposal that assistant public defenders argue *against* their clients before a judge to secure fees," is legally incorrect and misleading. (App. 13a). It makes the false assertion of fact that there is a conflict of interest for public defenders to seek recoupment of legal expenses to reimburse taxpayers. And they knew it. Petitioner had given them a copy of and explained the holding in *Bull v. State*, 540 So.2d 1103, 1105 (Fla. 1989), that there is "no ethical conflict in an attorney presenting a bill to a client even though the client is unable to pay at the time the bill is presented." They destroyed the copy and made up their own law.

When claiming that petitioner was unethical when he talked about his "Zero Drug Tolerance" program ("blows off any ethical concerns," (App. 14a), respondents conveniently omitted the fact that in *Keenan v. Watson*, 525 So.2d 476 (Fla. 5thDCA 1988), the three judge panel had found that the matter of a judge's leniency or severity in sentencing was a political matter for voters to decide in an election. They also failed to mention *ACLU v. The Florida Bar*, 744 F.Supp. 1094 (N.D. Fla. 1990), where the court made it clear that how judicial candidates will use their discretion is a matter of great concern to voters – and something voters had the right to hear. Petitioner gave them copies of both cases, which they destroyed.

Any news article written either as fact as a news item, or as opinion, that conflicts with a judicial determination of the truth represents a reckless disregard of the truth and is actionable libel of a public person. *Milkovich v. Lorain Journal Company*, 416 N.E.2d 662, 666 (Ohio App. 1979). Thus, the fact that a newspaper ignores the law is evidence of reckless disregard for the truth.

Their selective reporting gets even more egregious as it becomes apparent that they are campaigning for Judge Worthen. They report nothing negative about him and cover up his criminal sentencing record. In their statement, "The judge also feels that Carson's promises create an appearance that he's predisposed about drug cases and that defendants would not be subjected to a fair and impartial judiciary if Carson were elected to county judge," (App. 13a), respondents craftily purport to republish an "opinion" that contains a false factual implication – that a judge who sentences drug users severely will be disqualified for improper bias – a proposition that is directly refuted by *Keenan, supra*. They falsely claim that no "promise" was made by Judge Watson in *Keenan*. They made up this false fact, also. Petitioner was the assistant public defender who was assigned to Judge Watson's court. Jail was his promise, as it was his successor's, Judge Miller. And, significantly, respondents conveniently failed to mention Judge Worthen's sentencing promise – his nine year "record." Automatic probation for first offense drug users. He said that it might be "4 or 5 times" before he would send a drug user to jail. Petitioner told respondents about this and has a tape recording of Judge Worthen's radio interview. Respondents also knew that any claim by Judge Worthen of a "case by case" analysis was not true. Petitioner practiced defense law in Judge Worthen's courtroom, also. With the heavy caseload of misdemeanor court, the state and defense lawyers worked based on understandings of the judge's sentencing policy – or promise – probation for first time drug offenders. Without these understandings between those involved, the system would have become clogged and would break down. The "fair comment" privilege is vitiated by actual malice. *Curtis*, 388 U.S. at 152, n. 18

Respondents hid Judge Worthen's lenient sentencing promise because they knew Worthen would lose the election if the voters were completely informed. As a result, they demonstrated their power to control the local judiciary with their manipulative and selective publishing.

The effect of what the Florida court has done is to leave Petitioner without redress for his reputational injury and has given complete immunity to the respondents for quintessential false statements of fact. This conflicts with the reasoning of this Court in *Milkovich* and warrants certiorari review.

II. The judicial candidate free speech issue is currently pending in this Court.

In *Republican National Committee v. Kelly*, No. 01-521, argued March 26, 2002, this Court is considering whether Minnesota judicial conduct rules prohibiting candidates from "announc[ing] [their] views on disputed legal or political issues" violate the First Amendment guarantee of Free Speech. Though the case appears to involve only the "announce clause," the overall issue before this Court is Free Speech of *all* judicial candidates, elected or appointed. Thus, the "promises and pledges" clause is entwined with the "announce" clause.

In 1988, Florida was operating under an "announce" clause similar to Minnesota's, when, in *Keenan v. Watson*, 525 So.2d 476 (Fla. 5th DCA 1988), the court held that a judge who sentenced all persons to jail or prison in drug cases would not be disqualified because bias against the crime is not bias against any particular person. The court declared that, "If the voters do not want judges who are not sympathetic to drug violators, or who tend to punish them too harshly then they can vote them out of office. That is a political matter." *Id.* at 477. Thus, the matter of leniency or severity in sentencing is for the voters to decide. Federal courts have agreed that bias against the crime is not disqualifying bias against a particular person. *United States v. Serrano*, 607 F.2d 1145, 1149 (CA5 1979) (Florida drug case; announced views; promise of prison); *United States v. Richards*, 737 F.2d 1307, 1311 (CA4 1984) (South Carolina drug case; announced views; promise of prison; criticized Florida court leniency).

In 1990, a federal court in *ACLU v. The Florida Bar*, 744 F.Supp. 1094 (N.D. Fla. 1990), declared Florida's "announce" clause to be an unconstitutional infringement on Free Speech. Fla. Code Jud. Conduct, Canon 7(B)(1)(c). (App. 10a). It flatly rejected Florida's argument that information concerning a candidate's views on disputed legal or political issues is irrelevant to the electorate's decision making process and would undermine the public's confidence in the objectivity of the judiciary. It held that, "How judges choose to exercise that discretion is a matter of much concern to litigants, lawyers, and the public alike. That concern makes a

judicial candidate's views on disputed legal and political issues anything but irrelevant." *Id.* at 1099.

Undeterred, Florida officials simply changed the wording of the clause in an attempt to avoid the injunction. The Florida Supreme Court approves these Canons. *Candidates* could not "make statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are *likely to come before the court.*" Fla. Code Jud. Conduct, Canon 7(A)(3)(d)(ii) (Emphasis supplied). (App. 10a). This Canon is but a repetition of the stricken Canon. The "cases, controversies or issues" language is just another way of saying "disputed legal or political issues." *Significantly*, what the *Keenan* and *ACLU* courts were talking about was "disputed legal or political issues" that are "likely to come before the court." The "pledges or promises" clause remained the same as in 1988 and *Keenan*, *supra*, remained the law in Florida.

In *Buckley v. Illinois Judicial Inquiry Board*, 997 F.2d 224 (CA7 1993), an "announce" clause had been construed by the lower court as "being limited to statements on issues likely to come before the judge in a case." *Id.* at 226. The clause prohibiting candidates from making "pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office" was also in issue. The court called the lower court construction, "a patchwork job." *Id.* at 230. The court declared both clauses and the new construction to be invalid, noting that the "announce" clause, in reality, folds back into the "pledges or promises" clause. *Id.* Now, there should be no question that candidates who announce their views on disputed legal or political issues will be accused of making "pledges or promises."

It is the "cases, controversies or issues that are likely to come before the court" (and those that have already come before the incumbent) that the voters are going to be most interested in when they make their decision between the candidates. The rule seeks to gag the judicial candidate. In noting that the "silencing is temporary" and is "limited to the duration of the campaign", *id.* at 228, the court unmasked the real purpose of the rule. It is a rule about restricting candidate free speech, *not* a rule about prejudging cases! The challenger can say nothing to counter the incumbent's record And what of an incumbent who says, "I promise to do what I've been doing for the last six years" (though, not mentioning throwing all

drug offenders in jail or prison)?"

"At the heart of the First Amendment lies the principle that *each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence.* ... Government action that stifles speech on account of its message, or that requires the utterance of a particular message favored by the Government contravenes this essential right. Laws of this sort pose the inherent risk that the Government seeks ... to suppress unpopular ideas or information or manipulate the pubic debate through coercion rather than persuasion." *Turner Broadcasting System, Inc.v. F.C.C.*, 512 U.S. 622, 641 (1994) (emphasis supplied). "To this end, the government, even with the purest of motives, may not substitute its judgment as to how best to speak for that of speakers and *listeners*; free and robust debate cannot thrive if directed by the government". *Riley v. National Federation of the Blind*, 487 U.S. 781, 791 (1988) (emphasis supplied).

It is of great importance that this Court grant certiorari because prosecutor's for Florida's Judicial Qualification Commission are chilling candidate Free Speech rights by claiming that all judicial candidate's can say to voters is, "I pledge or promise the faithful performance of my duties."

III. The Questions involve important matters.

Reasons I and II, above, are important as already explained. All of the Questions are of great importance to Floridians because judicial elections are in September and qualifying begins in mid-May of this year. Judicial candidates need to know what they can say without being threatened by overzealous government ethics officials or unscrupulous news media who use the false accusation of an ethical violation to cover for their desire to hide disputed political issues that they disagree with from the voting public. The media, ironically, claiming they support the public's "right to know" about the workings of their government.

Florida's gubernatorial election is this year, also. Florida's Governor Jeb Bush is a Republican. When we have, as we do here, respondents who openly brag that they support the Democratic Party, the entire nation has cause for concern. Their willingness to sabotage conservative views could, in a close election, make a difference in

who becomes President of the United States. It could also determine who becomes Florida's next Governor. It is no coincidence that the Gore Campaign sought a manual recount in Volusia County, Florida. *See*, *Bush v. Gore*, 531 U.S. 98 (2000).

Florida judicial candidates, as well as the public's, interest in having state judges who will finally join the federal judiciary in the War on Drugs is of great importance in judicial elections this year. The assassination of anti-drug candidates in Colombia in order to keep narcotics flowing in the United States continues. This past February, 2002, former Colombian senator Ingrid Betancourt and two campaign workers were kidnapped and executed by drug traffickers. On March 16, 2002, according to Associated Press reports, Roman Catholic Archbishop Isais Duarte was riddled with bullets at point blank range by two gunman after he left a wedding ceremony. The investigation is centering on drug traffickers because Duarte had mentioned that some legislative candidates were financing their campaigns with drug money. Petitioner told respondents of the assassinations of anti-drug judges, politicians, and journalists in Colombia. They destroyed the related news article he gave them.

Recent TV ads in America say, "Drug money supports terror. If you buy drugs, you do to." Another chilling TV ad portrays a teenager who uses drugs saying, "I helped kill a judge."

Since Free Speech rights and the very integrity of Florida judicial elections are at stake, with potential national and international impact, the questions presented warrant review by this Court.

***Waiver of the protection of the* New York Times *standard*.** In *Curtis*, *supra* at 148, this Court counseled against "blind application" of *New York Times v. Sullivan* and immunizing the press from having to make reparation for the infliction of "*needless*" injury to honor and reputation through false publication. *New York Times* involved an advertisement, NOT endorsements or character assassination of candidates in a public election.

Constitutional rights can be waived. *Rhode Island v. Innis*, 446 U.S. 291 (1980). The Fifth Amendment is not a shield for perjury. *Harris v. New York*, 401 U.S. 222 (1971). The First Amendment is not a shield for defamation or the character assassinator. *St. Amant v. Thompson*, 390 U.S. 727 (1968) (Fortas, J., dissenting). Spreading false information in and of itself carries no First Amendment credentials. *Herbert v. Lando*, 441 U.S. 153, 171 (1979).

The media should be quickly and clearly notified that trifling with candidate's reputations and careers through the use of defamation and distortion is not, and will not be, protected by the Constitution. Freedom of the press comes along with responsibilities. CNN News anchor, Paula Zahn, has said, "Information is powerful ... Our responsibility to get it right has never been greater."

Elections are times when a person's reputation is most valuable. During elections, truthful media coverage is extremely important. Anything less places the media in the position of the respondents, embroiled in the "calculated falsehood," placing them "at odds with the premises of democratic government and with the orderly manner in which ... political change is to be effected." *Curtis*, *supra*, at 153. It deprives the voters of power to make a choice based upon truth and leads to voter apathy. Thus, where news media promises to do a thorough investigation and fails to investigate, the *New York Times* standard is waived and should not apply.

New York Times v. Sullivan ***should be revisited and overruled.*** This is, in part, because it has been a source of controversy, confusion, and abuse ever since. News media, such as respondents, claim they no longer have to investigate stories, even when they promise to do so. Justice Fortas' fear, in *St. Amant*, *supra*, of the grant of a license for "open season" shotgun attacks on public officials has come true. The dignity of individuals are no longer respected by some journalists if the story can pay the bills and dirt-digging can build a career. "Truth" has become a matter of convenience. If history is to be the guide for constitutional interpretation, there is no historical support (or need) for a different standard for public figures and private individuals. "Actual malice" is confusing to define and for juries to understand and apply.

Cases go on for years, even decades. Appeal after appeal. State court to federal court, back to State court, back to federal court. *Milkovich*, *supra*, (15 years); *Harte-Hanks*, *supra*, (6 years); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) (13 years). It has become the belief that the media can say anything they want about someone and get away with it. What attorney, or businessman, wants to wait 10 years for the mere "possibility" of being paid? What individual can afford the massive costs and attorney fees, if not on a contingency fee contract? The result is that people are deprived of representation of counsel. This is why petitioner finds himself *pro se*

in this case.

Imagine if, under the federal right of "Freedom of Travel," drivers were only to be held responsible if their driving was "reckless." There would be chaos on the highways. Reflecting back 38 years, the recklessness standard for the media has permitted too many to run amok.

Simple decency requires some investigation by the media when hurtful accusations are the topic. Their own ethical standards require more than the *New York Times* standard. There is no one to enforce their standards, other than the courts in defamation actions. Defamation law was designed to protect the reputation and dignity of the individual. *New York Times* has done the opposite.

IV. The State courts disregarded their own law and there is a need to avoid a shocking injustice that presents due process questions.

Courts have a duty to apply the law correctly regardless of whether the particular parties succeed in identifying such a correct interpretation. *United States Nat'l Bank of Or. v. Independent Ins. Agents of Am., Inc.*, 508 U.S. 439, 446 (1993). This Court has accepted jurisdiction to prevent injustice. *Thompson v. City of Louisville*, 362 U.S. 199 (1960).

The most obvious example of Florida court disregard for its own law is found in its declaration that unemployment compensation (UC) bureau records are "public" records. Section 443.1715(1), Florida Statutes (1999), makes it clear that these records are *confidential*. Seeking to comply with Section 303(a)(1) of the Social Security Act, the Florida Legislature made it clear that records of UC determinations, such as those in this case, are also confidential when it said:

> "These exemptions are a public necessity in that *harm caused by releasing such information outweighs any public benefit* that might be derived from releasing such information. *Information contained in such records is of a sensitive and personal nature, could be used to* discriminate against the person to whom the record pertains, and could *cause harm to the professional reputation of such individual*. Fear of disclosure could deter individuals from exercising their rights under the law."

Ch. 94-118 , s. 3, at 436, Laws of Fla. (emphasis supplied). *See also, Husted v. Norwood*, 529 F.Supp. 323 (S.D. Fla. 1981) (UC records exempt from federal Freedom of Information Act). Failure to retain confidentiality of UC records is a crime. Section 443.1715(1), Fla. Stat. (1999).

The importance of this confidentiality provision is found in its effect on respondents' claim of "fair reports privilege" as to UC records. Section 611, comment i, Restatement (Second) of Torts, upon which Florida relies, provides that the fair reports privilege "does not extend to a report of a private meeting, not open to the general public, or to a report of a meeting that does not deal with matters of public concern, even though it is open to the public." Thus, UC Bureau records are, by law, confidential and reporting false and defamatory statements from them is not protected by the privilege. *Accord, Shiles v. News Syndicate Co.*, 261 N.E.2d 251 (N.Y. 1970). Florida decisional law has a similar provision in *Shiell v. Metropolis Co.*, 136 So. 537, 543 (1931), saying, "If the restraints and qualifications imposed by law upon the publicity to be given communications be disregarded, the communication is not privileged."

The Florida 5th DCA panel also disregarded the holding of a different three judge panel in *News-Journal v. Carson*, 741 So.2d 572, 575 (Fla. 5th DCA 1999). That panel, referring to documents that were later learned to have been destroyed by respondents, noted that the document could show that respondents "knew 'true facts' and had a reasonable basis *not* to print the story without further inquiry." This holding has *two implications* that were unfavorable to the respondents. First, it represents a recognition by the panel that *respondents waived the fair reports privilege* when they promised a through investigation and to speak with people who knew the candidates. Second, it recognizes that *respondents engaged in the purposeful avoidance of the truth* when they did not conduct the promised investigation in 1996 and when they ignored Petitioner's pleas and did no investigation in 1998. In effect, the panel was saying that summary judgment should not be granted, a holding that is consistent with both *Curtis* and *Harte-Hanks, supra*. Two of these judges have since retired.

Another disregard for summary judgment law comes with the 5th DCA panel's discussion of the UC Bureau's determination that

Petitioner was terminated from his employment for reason's other than misconduct as not being an acquittal. The panel simply invaded that province or the jury. Since the evidence might be susceptible of two interpretations, the favorable inferences go to petitioner. The description of the UC determination as an acquittal of a false allegation of egregious misconduct is a matter of *fact*. This description is reinforced by Petitioner's former supervisors, who contradict the false claims of poor work performance. *See*, *Phanco v. Unemployment Appeals Commission*, 639 So.2d 695 (Fla. 5th DCA 1994) (the panel effectively acquitting Phanco, finding the evidence actually was favorable to him); *Tibbs v. State*, 397 So.2d 1120 (Fla. 1981) (appellate reversal "tantamount to" acquittal where there is insufficient evidence).

Disregard for summary judgment law by the panel occurs, again, when they depict the reasons given by Petitioner's former employers for termination as true. When respondents filed their motion for summary judgment, they admitted the employer's statements were false and defamatory in order to claim the defense of fair reports privilege. Now, people read the court's decision and believe the false accusations against Petitioner are true.

The court's handling of the question of whether two of the statements are susceptible of defamatory meaning is also shocking. In a July 22, 1999, hearing, the statement, "Carson fails to see the conflicts of interest inherent in his proposal that assistant public defenders argue *against* their clients before a judge to secure fees", (App. 14a), was discussed. The trial court *admitted* that "red flags go up and bells and whistles go off" when a statement including "conflict of interest" and "lawyers" is made. Nevertheless, he ruled that it was not susceptible of defamatory meaning because "normal people" don't see it that way and all lawyers know there is no conflict of interest. The statement, "Carson simply blows off any ethical concern by asserting free-speech rights," considered in the context of the entire editorial, was likewise held not susceptible of defamatory meaning. Of course, it that was so, then there was no need to print the statements. Affidavits of a lawyer and painter were later submitted to the 5thDCA panel, verifying that they read these statements in the editorials to be defamatory attacks on competence and ethics.

Respondents continue to republish the false and defamatory

statements about the petitioner. The latest publication being on January 16, 2002. They now claim that petitioner "failed to convince lower courts that he was defamed" even though they admitted, through summary judgment, that certain statements were false and defamatory. And, there is a new version that contradicts one of their previous libels. They claim that he was fired from the Attorney General's office "for a poor work evaluation." This is NOT true. It appears to be in keeping with their attorney's promise on April 14, 1999, "We're going to make it hurt more."

The preservation of open and vigorous debate does not require protecting such deliberate and callous indifference to the truth as has been exhibited by the respondents in this case.

CONCLUSION

WHEREFORE, Petitioner requests that this honorable court grant his petition to consider the important questions presented and to correct a serious injustice which has precluded him from having his defamation case heard on the merits.

Respectfully submitted,

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SUPREME COURT OF FLORIDA

WEDNESDAY, JANUARY 9, 2002

CASE NO. : SC01-2056
Lower Tribunal No.: 5D00-1996

KIT CARSON vs. NEWS-JOURNAL CORPORATION, ET AL.

Petitioner(s) Respondent(s)

Respondent's Motion to Dismiss filed in the above cause is granted and it is ordered that the Notice to Invoke Discretionary Jurisdiction be and the same is hereby dismissed.

WELLS, C. J., and SHAW, HARDING, ANSTEAD and PARIENTE, JJ., Concur.

True Copy
Test:

/s/_____ [Seal of Florida Supreme Court]
Thomas D. Hall
Clerk, Supreme Co urt

bm
Served:

HON. FRANK J. HABERSHAW, CLERK
KEVIN K. CARSON
DANIEL R. BISCHOF
JONATHAN D. KANEY, JR.
HON. DIANE M. MATOUSEK, CLERK
HON. JOSEPH G. WILL, JUDGE

IN THE DISTRICT COURT OF APPEAL OF THE
STATE OF FLORIDA , FIFTH DISTRICT
JANUARY TERM 2001

KIT CARSON,

Appellant,

v. CASE NO. 5D00-1996

NEWS-JOURNAL CORPORATION,
AND TIPPEN DAVIDSON,

Appellee.

_____/

Opinion filed June 15, 2001

Appeal from the Circuit Court
for Volusia County,
Joseph G. Will, Judge.

Kevin Kitpatrick Carson, of
Kevin "Kit" Carson, P.A.,
Daytona Beach, pro se.

Jonathan D. Kaney, Jr., Bruce A. Hanna,
and Jonathan D. Kaney, III, of Cobb, Cole
& Bell, Daytona Beach, for Appellee.

PER CURIAM

In this defamation action, Kit Carson appeals the final summary judgment entered in favor of the News-Journal Corporation and Tippen Davidson, the newspaper's chief executive officer (collectively News-Journal). We affirm.

In his complaint, Carson alleged that the News-Journal defamed him when it published news stories and editorial statements

relating to his 1996 candidacy for the office of Public Defender and his 1998 candidacy for county judge. The complaint alleged that fourteen statements published by the News-Journal were defamatory. The News-Journal defended on three grounds: (1) certain statements were not susceptible of possessing a defamatory meaning; (2) certain statements were expressions of pure opinion; and (3) certain statements were privileged as being fair reports of official records. The trial court ruled that none of the fourteen statements were actionable. We agree.

Only one of the claims of error raised by Carson in this appeal merits discussion; namely, his claim that certain articles printed by the News-Journal relating to the circumstances surrounding two instances when he was discharged from his employment were not protected under the fair reports privilege. The articles at issue were based upon information contained in two public documents from Florida's Bureau of Unemployment Compensation (Bureau). The fair reports privilege requires that, in order to be privileged, a news report of a public document must contain the substance of the subject the document undertakes to present, or any separable part thereof. See Restatement (Second) of Torts, § 611 (1976); Shiell v. Metropolis Co., 102 Fla. 794, 136 So. 537 (1931). Carson contends that the privilege could not be invoked here because the News-Journal's articles were not fair abridgements of the occurrences reported in the Bureau's documents.

In reporting on Carson's employment history, the News-Journal accurately summarized the portion of the first document which indicated that the Public Defender's office had stated that Carson was discharged for "unsatisfactory work performance." Carson contends that this news report was actionable because it failed to reveal that the document further indicated that the Bureau had determined that his discharge was for reasons other than "misconduct connected with his work" and that he was awarded unemployment compensation benefits. In connection with the News-Journal's report concerning the second document, which related to Carson's subsequent dismissal by the Attorney General's office for allegedly refusing to perform assigned work, Carson contends that the News-Journal could be found liable for failing to report that the remaining portion of that document indicated that Carson was awarded unemployment compensation benefits

following his dismissal by that office. As to both documents, Carson maintains that the portions of the reports indicating that he was discharged for reasons other than misconduct and that he was awarded benefits were not separable from the portions stating that he was discharged for unsatisfactory work performance and, thus, should have been included in the new articles in order for the reports to be accurate. We disagree. The trial court properly ruled that these news reports were not actionable because they accurately summarized separable portions of the Bureau's two public documents. The focus of the News-Journal's reports was an explanation from Carson's former employers of the reasons for his discharge, not whether Carson was entitled to receive unemployment compensation benefits in connection with his discharge from such employment.'
AFFIRMED.

THOMPSON, C.J., SAWAYA, and PALMER, J.J., concur.

'Carson's argument appears to be based upon the incorrect assumption that a finding in his favor on the issue of entitlement to receive unemployment compensation benefits necessarily rebutted the truth of the allegations made by the Public Defender's office and the Attorney General's office concerning the reasons for his discharge, or "acquitted him" of those allegations. Such is not the case. The standard for denial of unemployment compensation is "misconduct connected with work." See §443.036(29), Fla. Stat. (1999) (defining misconduct as being "conduct evincing such willful or wanton disregard of an employer's interest," or "carelessness or negligence of such a degree or recurrence as to manifest culpability, wrongful intent, or evil design or to show an intentional and substantial disregard" of an employer's interest or duties and obligations). Grounds which are sufficient for discharge for unsatisfactory work performance may not be serious enough to constitute misconduct connected with work. See Jackson v. Unemployment Appeals Comm'n, 730 So.2d 719, 721 (Fla. 5th DCA 1999).

United States Constitution, Amendment I

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

United States Constitution, Amendment XIV

"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deprive to any person within its jurisdiction the equal protection of the laws ..."

The Florida "Journalists Privilege" provides, in pertinent part:

90.5015 Journalist's Privilege.–

(2) PRIVILEGE.– A professional journalist has a qualified privilege not to be a witness concerning, and not to disclose the information, including the identity of anyh source, that the professional journalist has obtained while actively gathering news. This privilege applies only to information or eyewitness observations aobatined within the normal scope of employment and does not apply to physical evidence, eyewitness observations, or visual or audio recordings of crimes. A party seeking to overcome this privilege must make a clear a specific showing that:
(a) The information is relevant and material to unresolved issues that have been raised in the proceeding for which the information is sought;
(b) The information cannot be obtained from alternative sources; and
(c) A compelling interest exists for requiring disclosure of the information.
(3) A court shall order disclosure pursuant to subsection (2) only that portion of the information for which the showing under subsection (2) has been made and shall support such order with clear and specific findings made after a hearing.

Florida campaign financing law provides, in pertinent part:

106.143 Political advertisements circulated prior to election; requirements.--

(1) Any political advertisement and any campaign literature published, displayed, or circulated prior to, or on the day of, any election shall:
(a) Be marked "paid political advertisement" or with the abbreviation "pd. pol. adv."
(b) Identify the persons or organizations sponsoring the advertisement.
...

(4) Any political advertisement, including those paid for by a political, other than an independent expenditure, offered by or on behalf of a candidate must be approved in advance by the candidate. Such political advertisement must expressly state that the content of the advertisement was approved by the candidate and must state who paid for the advertisement. The candidate shall provide a written statement of authorization to the newspaper, radio station, television station, or other medium for each such advertisement submitted for publication, display, broadcast, or other distribution.

Florida's Unemployment Compensation record confidentiality law (emphasis supplied) provides, in pertinent part:

443.1715 Disclosure of information; confidentiality.--

(1) RECORDS AND REPORTS.– *Information revealing the employing unit's or individual's identity obtained from the employing unit* or from any individual pursuant to the administration of this chapter, and any determination revealing such information, *must*, except to the extent necessary for the proper presentation of a claim or upon written authorization of the claimant who has a workers' compensation claim pending, *be held confidential and exempt from the provisions of s. 119.07(1) and s. 24(a), Art. I of the State Constitution*. Such information may be made available only to public employees in the performance of their public duties, including employees of the Department of Education and Training Placement Information Program and the Department of Commerce in it administration of the qualified defense contractor tax refund program authorized by s. 288.104. *Except as otherwise provided by law, public employees receiving such information must retain the confidentiality of such information*. Any claimant, or the claimant's legal representative, at a hearing before an appeals referee or the commission shall be supplied with information from such records to the extent necessary for the proper presentation of her or his claim. *Any employee or member of the commission or any employee of the division, or any other person receiving confidential information, who violates any provision of this subsection commits a misdemeanor of the second degree, punishable as provided in s. 775.082 or s. 775.083.*

Restatement (Second) of Torts, Section 611, comment i , (emphasis supplied) provides:

i. Public meetings. The privilege covered by this Section also extends to a report of any meeting, assembly or gathering that is open to the general public and is held for the purpose of discussing or otherwise dealing with matters of public concern. As in the case of the report of official proceedings, the purpose of the privilege is to protect those who make available to the public information concerning public events that concern or affect the public interest and that any member or the public could have acquired for himself by attending them. The fact that admission is charged does not destroy the privilege so long as any one is free to pay it. On the other hand, *the privilege does not extend to a report of a private meeting, not open to the general public, or to a report of a meeting that does not deal with matters of public concern, even though it is open to the public.*

The 1989 version of Canon 7(B)(1)(c), Code of Judicial Conduct, provided in pertinent part:

B. Campaign Conduct.

(1) A candidate, including and incumbent judge, for a judicial office that is filled either by public election between competing candidates or on the basis of merit system election:

[c] should not make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office; announce his political views on disputed legal or political issues; or misrepresent his identity, qualifications, present position, or other fact.

The current version, Canon 7(A)(3)(d)(i) & (ii), Code of Judicial Conduct, provides, in pertinent part:

Canon 7. A Judge or Candidate for Judicial Office Shall Refrain From Inappropriate Political Activity

A. All judges and candidates.

(3) A candidate for a judicial office:

(d) shall not:

(i) make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office;

(ii) make statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court; ...

Canon 7 C (1), Code of Judicial Conduct, provides, in pertinent part:

C. Judges and Candidates Subject to Public Election.

(1) A candidate, including an incumbent judge, for judicial office that is filled by public election between competing candidates shall not *personally* solicit campaign funds, or solicit attorneys for publicly stated support, but *may* establish committees of responsible persons to secure and manage the expenditure of funds for the candidate's campaign and to obtain public statements of support for his or her candidacy. Such committees are not prohibited from soliciting campaign contributions and public support from any person or corporation authorized by law. A candidate shall not use or permit the use of campaign contributions for the private benefit of the candidate or members of the candidate's family.

Respondents sought summary judgment as to the following statements based upon the "fair reports privilege":

Statement 4(b) (from November 2, 1996, endorsement editorial):

[H]e was fired by the state Attorney General's Office in Daytona Beach in February 1988 for "allegedly refusing to perform the assigned work," according to state records.

Statement 5 (from November 2, 1996, endorsement editorial):

He was fired by the public defender in Florida's 3rd Judicial Circuit after only six weeks in 1985 for "unsatisfactory work performance," records show.

Statement 6 (from the August 24, 1998, news story):

According to public records, Carson was discharged from the Public Defender's Office in Lake City for unsatisfactory work performance. He worked there for a month in 1985.

Statement 7 (from the August 24, 1998, news story):

Carson also worked at the local Attorney General's Office for more than two years before he was dismissed in 1988. A 1986 evaluation said Carson achieved performance standards and exceeded in several areas such as professional attitude and cooperation. However, his next evaluation said he barely achieved performance standards and rated below average on professional attitude and cooperation.

Statement 8 (from the August 30, 1998, voter's guide--two days before the election):

In the mid to late 1980s, Carson was discharged or dismissed from his jobs with the Public Defender's Office in Lake City and the Attorney General's Office in Daytona Beach. Public records show Carson was discharged from the Public Defender's Office in Lake

City for unsatisfactory work performance. Carson was discharged for allegedly refusing to perform the assigned work, records show.

Statement 14 (from the September 2, 1998, news article--the day after the election):

He ran unsuccessfully against Gibson in 1989 and 1996. Carson also worked for the Public Defender's Office in Lake City briefly in 1985 before being discharged for unsatisfactory work performance. Carson worked for the local office of the state attorney general for more than two years before being discharged in 1988 after a poor work evaluation.

Respondents sought dismissal of the following statements as protected by the First Amendment of the United States Constitution as pure opinion:

Statement 2 (from November 2, 1996, endorsement editorial):

Carson fails to see the conflicts of interest inherent in his proposal that assistant public defenders argue *against* their clients before a judge to secure fees.

Statement 3 (a) (from November 2, 1996, endorsement editorial)

In addition to his misguided emphasis on fee collection, Carson lacks other important qualifications.

Statement 4 (a) (from November 2, 1996, endorsement editorial) Carson's record of employment in the justice system, which ended about six years ago, is unimpressive . . .

Statements 9 (from the August 30, 1998, voters guide):

The judge also feels that Carson's promises create an appearance that he's predisposed about drug cases and that defendants would not be subjected to a fair and impartial judiciary if Carson were elected to county judge.

Statement 10 (from August 29, 1998, endorsement editorial):

This campaign promise comes uncomfortably close to violating judicial ethics guidelines on prejudging cases ...

Statement 11 (from August 29, 1998, endorsement editorial):

Carson simply blows off any ethical concerns by asserting free-speech rights . . .

Statement 12 (from August 29, 1998, endorsement editorial):

Carson's anti-drug pledge is also misleading ...

Statement 13 (from August 29, 1998, endorsement editorial):

Florida's judicial ethics also bar candidates from asking for donations. Yet Carson's own campaign brochure, paid for by Carson as treasurer, asks people to "Contribute funds to the Kit Carson for Judge Campaign." Carson's "zero tolerance" looks more like "zero ethics."

Respondents sought dismissal as to the following statements alleging that they were not susceptible of being interpreted as having defamatory meaning:

Statement 2: Carson fails to see the conflicts of interest inherent in his proposal that assistant public defenders argue against their clients before a judge to secure fees.

Statement 11: Carson simply blows off any ethical concerns by asserting free-speech rights.